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281-907—67

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 715

S. LAWRENCE KAHN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 718

ARTHUR B. SACHS AND M. PRIAL CURRAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (K. Pet. App. 1a–28a)[1] is reported at 381 F. 2d 824.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1967. A petition for rehearing was denied

[1] "K. Pet." refers to the petition filed by Kahn in No. 715.

on September 12, 1967 (K. Pet. App. 42a). The petition for a writ of certiorari in No. 715 was filed on October 11, 1967, and that in No. 718 on October 12, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion in refusing to sever the co-defendants.

2. Whether the trial court's instructions on credibility were erroneous or unfair.

3. Whether the trial court properly refused petitioner Kahn's request for an instruction on the defense of good-faith reliance on legal advice, on the ground that there was no evidence to support such a defense.

4. Whether the indictment failed to allege essential elements of the offenses.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted on various counts of an eighteen count indictment charging conspiracy and the illegal use of funds of a number of federally insured banks and savings associations, in violation of 18 U.S.C. 371, 656, 657, 1005, and 1006. On March 11, 1966, petitioner Sachs, who was convicted on ten counts, was sentenced to concurrent terms of imprisonment for five years on each count. Petitioner Curran was sentenced to concurrent two-year terms on four counts, and petitioner Kahn to concurrent terms of five years each on six

counts (S. App. 412–415).[2] The court of appeals affirmed.

The government's evidence was developed through numerous documents and the testimony of officers and employees of the financial institutions, and showed a chain of misuse of funds of one banking institution to acquire another. We do not canvass the evidence in detail since its sufficiency is not disputed. The pattern of petitioners' operations is exemplified, however, by the evidence relating to Counts III and IV, which shows how control of Leyden Savings and Loan Association was acquired.[3] Although Leyden was a mutual association, not subject to sale, there was an understanding that control of the association would shift with the sale of its building, worth $120,000, for $450,000 (Tr. 481–487). The purchase was financed by two loans from the Chatham Bank of Chicago, which Kahn controlled (Tr. 3080).

The first of these two loans, in the amount of $225,000, representing the bank's maximum limit, went to the Sandy Building Corporation, a company incorporated by Sachs and Curran. The loan was secured by a mortgage on property represented by Kahn to be worth over $400,000, but which an appraisal showed to be worth $257,000 (Tr. 1833–1835; 878–882). All of the details of this loan were handled by Sachs and Curran as the attorneys for all parties—Chatham,

[2] "S. App." refers to the appendix of the petitioners Sachs and Curran in the court below; "Tr." to the original transcript of trial proceedings.

[3] All of the petitioners were convicted on Count III, and Kahn and Sachs on Count IV. In addition, this acquisition was a major part of the conspiracy charge.

Kahn, and Sandy Building Corporation. The loan was not presented to the board of directors of Chatham, a fact of which Sachs was aware (Tr. 89–121, 278–285, 3069).

On the same day, Chatham granted the second loan. This loan, for $155,000, was made to one Ferrari (deceased at the time of trial), on the basis of a false letter of commitment on behalf of another association. The check was delivered to the office of Sachs, endorsed over to Sachs, and deposited in his bank account. Sachs then bought a cashier's check for $155,000. This check and the proceeds of the Sandy loan were used to purchase Leyden (Tr. 89–122, 245–278, 3077).

Curran, an associate in Sachs' law office, and employees and friends of Sachs and Kahn were elected directors of Leyden, and Sachs became its attorney (see Tr. 3079, 875–877). Improper disbursements of its funds to acquire other associations and to cover past manipulations as charged in other counts, then followed.

ARGUMENT

1. *Severance.* The petitioners in No. 718, Sachs and Curran, elected to testify at their trial, and they now argue that requiring them to be tried jointly with Kahn, who did not testify, deprived them of a Sixth Amendment right to call Kahn to the witness stand, and, in the event he refused to testify, to ask the jury to glean from such refusal an inference favorable to them.

This case, however, does not fairly present the issue raised by these two petitioners as to whether a

severance must be granted when a co-defendant "urgently needs to call to the witness stand a co-defendant" (S. Pet. 2).[4] Their involvement was not a matter peculiarly within Kahn's knowledge. Testimony as to incidents from which a knowing breach of trust could be inferred was presented by ten or more officers or employees of the institutions involved,[5] some of whom had close personal contacts with Sachs and Curran. Particularly damaging (as counsel for Sachs and Curran recognized (S. App. 333)) was the testimony of Mary Burleson, Kahn's secretary, who prepared documents and checks at Kahn's direction and who worked closely with the other petitioners (S. App. 98–222). Damaging evidence also came from such sources as an appraiser, who followed Kahn's and Sachs' instructions in inflating values (Tr. 1870–1878), and a state examiner who told of incriminating statements by Sachs (Tr. 449–458). Indeed, late in the trial, counsel for Sachs and Curran advised the court:

> Your Honor, in connection with this question of the severance, in a memorandum which we filed in which we discussed the Echles [sic] case, I indicated the possibility that we might call Mr. Kahn; I said that we would take it up in advance.

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[4] "S. Pet." refers to the petition in No. 718, filed by Sachs and Curran.

[5] There was, for example, the testimony of Mr. Jernberg, a former president of Chatham Bank (Tr. 82–145); Mr. Musich, an executive vice president of the same bank (Tr. 244 *et seq.*); Mr. Conti, the former president of Leyden Savings and Loan Association (Tr. 479 *et seq.*), etc.

> I want to say that we have decided that that will not be done so that particular question will not arise [S. App. 328].[a]

This case is not comparable to *Washington* v. *Texas*, 388 U.S. 14, on which petitioners rely. In that case there was no question of severance. This Court held that a state statute which prevented a participant in a crime from testifying for a co-participant (but not for the prosecution) unconstitutionally denied to a defendant charged with murder the right to compulsory process. There the co-participant, who had been convicted of the murder, was willing to testify (and was the only person who could have so testified) that he—not the defendant—had fired the fatal shot and that the defendant had sought to prevent him from doing so. Thus, the defendant there was denied the only source of vital and exonerating testimony—testimony which was admittedly available.

By contrast, there is not the slightest support for Sachs' and Curran's speculation (S. Pet. 9, n. 4) that Kahn might have been willing to testify in their favor if a severance had been granted. In light of the breadth of the privilege of even a mere witness to fend off inquiries that might possibly connect him with a crime, there is little likelihood that Kahn could have been compelled to testify about any of the transactions in which he, Sachs, and Curran engaged.

[a] The case referred to is that of *United States* v. *Echeles*, 352 F. 2d 892, where the Seventh Circuit, in an explicitly limited decision, held that severance was necessary where a co-defendant had three times previously in open court, and apparently contrary to his own penal interest, voluntarily exculpated Echeles.

In *Washington*, this Court felt it necessary to caution that vindication of the right to secure the attendance of witnesses should not "be construed as disapproving testimonial privileges, such as the privilege against self-incrimination * * *." 388 U.S. at 23, n. 21.

The thrust of the allegation of prejudice resulting from the denial of the motion by Sachs and Curran to sever their trial from Kahn's is that, even if Kahn stood mute, they would have had "the valuable opportunity—specifically denied them by the trial judge below—to comment to the jury upon Kahn's unwillingness to testify * * *." (S. Pet. 9–10.) To begin with, we question whether an inference could be legitimately drawn from a co-indictee's desire to stand on his privilege. Furthermore, the circumstances of the instant case negate petitioners' contention that they have been prejudiced by their inability to comment on Kahn's failure to testify. Once again, the factual situation is critically different from that in the case on which they rely. In *DeLuna* v. *United States*, 308 F. 2d 140 (C.A. 5), there was a factual issue as to which of two occupants of an automobile had knowingly possessed the narcotics thrown from the car's window. De Luna (who was convicted) did not testify. His co-defendant (who was acquitted) did testify, and contended that De Luna alone was guilty, and his counsel commented repeatedly upon De Luna's failure to testify. All that the court held was that De Luna's privilege against self-incrimination was violated by the comments made by counsel for his co-defendant, and it accordingly reversed De Luna's conviction. The petitioners, however, seize upon the ob-

servation, clearly dictum, that if counsel's duty should require him to draw the jury's attention to the "possible inference of guilt" from a co-defendant's silence, then the judge would be obliged to order the defendants tried separately. Passing for the moment the fact that this proposition, like much dictum, was unsupported by reference to precedent or principle, it nevertheless does not advance petitioners' cause. Judge Wisdom was explicitly concerned with an inference of guilt to be drawn from silence. Even assuming such an inference might in some circumstances be tolerable where the co-indictee is being separately tried, the Fifth Circuit suggested the possibility only in a case presenting very different and far more compelling factors. There was a peculiar factual circumstance (similar to that in *Washington* v. *Texas, supra*) where only two persons had vital knowledge of the crime, and the defenses were in head-on collision, for if one witness were believed the other could not be. Thus counsel for the testifying defendant sought to suggest that sole guilt should be inferred from the refusal of the co-defendant to explain his conduct, thus exonerating the client. Here the situation is significantly distinguishable.

Sachs and Curran contended that they acted merely as attorneys for Kahn without fraudulent intent; this defense could not be aided by commenting on Kahn's failure to take the stand. The question was whether the documentary and other evidence introduced by the government, which these petitioners denied or attemped to explain away, justified an inference that

their participation in the various machinations was knowing. Kahn's silence neither added to nor detracted from the resolution of that issue, for his silence could not rationally suggest a motive to foist blame on Sachs and Curran by concealing his own guilt. Moreover, although Kahn was protected by the court's instruction that no inference could be drawn from defendant's failure to take the stand (S. App. 368), counsel for Sachs and Curran was permitted to refer to the fact that his clients had testified (S. App. 328, 330; Tr. 3787). It is apparent, then, that these two petitioners were not entitled to a severance.

Kahn's contention that the court abused its discretion by denying his requests for severance is equally without merit. He suggests no factors coloring this case that would not be applicable to any joint trial of co-conspirators, or principals and aiders and abettors. The nature of his defense—that he was innocently relying on the advice of counsel during the contrived dealings—made it especially improbable that the applicability of the evidence to specific defendants would be blurred in the minds of the jurors. His participation in the transactions was irrefutable.

2. *Instructions on credibility.* With varying emphasis and for varying reasons, both petitions attack the lengthy instructions given by the trial court (K. Pet. App. 11a–14a) on assessing the credibility of witnesses. We find no support whatever in the record for the assumption (K. Pet. 13–14) or assertion (S. Pet. 21) that the court was prompted to give the instruction because of matters coming to its attention in an *in camera* examination of pre-trial statements of

Sachs and Curran which the court refused to allow the government to use for impeachment purposes.[7] In any event, the factor that moves a trial judge to render an instruction would appear to be insignificant so long as the instruction is relevant to the issues and accurate in its import. This instruction certainly did not prejudice any of the defendants. While lengthy, it was correct and well balanced and applicable to all witnesses—government and defense alike (See K. Pet. App. 11a–14a, n. 5). It did not unduly single out the testimony of Sachs and Curran as meriting attention. Significantly, the court cautioned the jury to weigh the testimony of government witness Mary Burleson (Kahn's secretary and alleged co-conspirator) with greater care than an ordinary witness (S. App. 369). It was on her testimony that counsel for Sachs and Curran focused his attack on credibility (S. App. 334).[8]

3. *Refusal of instructions on reliance on attorney's advice.* Petitioner Kahn offered no evidence that he was acting in good-faith reliance upon the advice of counsel. In light of the absence of evidentiary founda-

[7] The court found the reports to be excluded by virtue of a pre-trial stipulation that the reports would not be used at trial.

[8] Petitioners were not improperly denied a mistrial when, on the second day of trial before any witness took the stand, their co-defendant, Joyce, entered a plea of guilty outside the presence of the jury as an aider and abettor under Count IV. The defendant Curran was not named in this count. When the court informed the jury of the bare fact of the plea, the jury was instructed that it was to determine the guilt or innocence of the other defendants without regard to the plea (Tr. 69–70), and this instruction was repeated at the close of the evidence (S. App. 355).

tion for this specific defense, the trial court did not err in refusing to render the proposed instruction that explicitly depended on the existence of such evidence (K. Pet. 14). See *Perkins* v. *United States,* 315 F. 2d 120, 124 (C.A. 9), certiorari denied, 375 U.S. 916; *United States* v. *Hickey,* 360 F. 2d 127 (C.A. 7), certiorari denied, 385 U.S. 928. In any event, the court's instructions did place the issue of good faith before the jury; the court repeatedly advised the jury that it could convict only if it found that the defendants acted with a specific purpose to violate the law, with knowledge of its prohibition, and not because of mistake, accident, etc. See *Beck* v. *United States,* 305 F. 2d 595 (C.A. 10), certiorari denied, 371 U.S. 890.

4. *Adequacy of the indictment.* There is no merit to petitioner Kahn's attack on the indictment as a pleading.

While the conspiracy count did not specify with exactitude Kahn's official positions with the federally insured institutions (as the substantive counts did), it did allege that he and the other petitioners exploited their fraudulent scheme "through their control of the management and operation" of the various institutions. (See K. Pet. App. 30a–31a). The count read as a whole, especially as detailed by the specification of some eighteen overt acts (K. Pet. App. 33a–35a), was adequate beyond peradventure to apprise petitioner of the conduct being challenged, to inform him of the contentions he would meet, and to protect him against further prosecution for the same offense. *Hagner* v. *United States,* 285 U.S. 427, 431.

Nor is there substance to the contention that various counts defectively failed to allege conversion to the petitioners' personal use. The substantive counts (see Counts III, IV, VII, charging misapplication under 18 U.S.C. 656, K. Pet. App. 35a–38a), alleged that Kahn and the other petitioners, as officers of federally insured institutions, wilfully misapplied funds by fraudulently disbursing specified amounts "well knowing," *inter alia*, that property pledged as security for the loan was grossly over-valued; that the loan would be used for the personal benefit and advantage of the petitioners; and that the loan was granted on the basis of a fraudulent letter of commitment. Compare *Ramirez* v. *United States*, 318 F. 2d 155 (C.A. 9). The court below properly held that these counts thus sufficiently alleged criminal conduct, not mere maladministration, and met the test of *United States* v. *Britton*, 107 U.S. 655, and its own decision in *United States* v. *Quinn*, 365 F. 2d 256 (C.A. 7).

CONCLUSION

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

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